

BEFORE THE  
**Federal Communications Commission**

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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In the Matter of )  
 )  
Rules and Policies on Foreign Participation )  
in the U.S. Telecommunications Market )  
\_\_\_\_\_ )

IB Docket No. 97-142

To The Commission:

**COMMENTS  
OF  
SHELL OFFSHORE SERVICES COMPANY**

Shell Offshore Services Company ("SOSCo"), by its undersigned attorneys, hereby respectfully submits these Comments in response to the Order and Notice of Proposed Rulemaking ("Notice") released by the Federal Communications Commission ("Commission") on June 4, 1997 in the above-captioned proceeding.<sup>1</sup> SOSCo supports the Commission's proposal to create a rebuttable presumption that it is in the public interest to grant a license or authorization to applicants from countries which are parties to the World Trade Organization Agreement on Basic Telecommunications Services ("Basic

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<sup>1</sup> *In the Matter of Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Order and Notice of Proposed Rulemaking, IB Docket No. 97-142, FCC 97-195 (adopted June 4, 1997) ("Notice").

Agreement"). Specifically, SOSCo urges the Commission to forego applying the effective competitive opportunities ("ECO") analysis to any service subject to Section 310(b)(4) of the Communications act of 1934, as amended, where an applicant's home country has committed to market access equal to or greater than that guaranteed by the United States.<sup>2</sup>

## I. STATEMENT OF IDENTIFICATION

SOSCo is the common carrier licensee of a broadband digital microwave network in the Gulf of Mexico. Because SOSCo's foreign ownership interests exceed the 25% benchmark,<sup>3</sup> the Commission was required to determine whether grant of the licenses was consistent with its public interest obligations under Section 310(b)(4) of the Communications Act of 1934, as amended.<sup>4</sup> In making this determination, the Commission examined whether effective competitive opportunities for U.S. companies

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<sup>2</sup> SOSCo's parent companies are organized under the laws of the United Kingdom and the Netherlands. Both countries have made commitments to completely open their telecommunications markets and have adopted the Reference Paper on Pro-Competitive Regulatory Principles.

<sup>3</sup> SOSCo's principal U.S. parent corporation, Shell Oil Company ("SOC"), is also incorporated in Delaware, and headquartered in Houston, Texas. SOC's stock is held by Shell Petroleum, Inc., a Delaware corporation which is directly and jointly owned by two foreign corporations. Specifically, Shell Petroleum, Inc. is 60% owned by the Royal Dutch Petroleum Company, organized under the laws of the Netherlands, and 40% owned by the Shell Transport and Trading Company, p.l.c., organized under the laws of the United Kingdom.

<sup>4</sup> *In the Matter of Shell Offshore Services Company Applications for Authority to Operate Common Carrier Digital Microwave Stations in the 5925-6425 MHz and 6525-6875 MHz Frequency Bands*, DA 96-1485 (adopted August 29, 1996).

existed in the point-to-point microwave service in the Netherlands and the United Kingdom. The required ECO analysis consisted of a highly "fact-specific, detailed review . . . requir[ing] substantial commitments of time and resources by both [SOSCo] and the Commission."<sup>5</sup> SOSCo became one of the first foreign owned applicants to be granted a common carrier radio license based on a showing of effective competitive opportunities in its parent corporations' countries of origin.

## II. DISCUSSION

### a. The Goals and Objectives of the ECO Analysis Are Met by the Basic Agreement.

In its *Foreign Carrier Entry Order*, the Commission set out three goals for the regulation of the U.S. international telecommunications market: (1) to promote effective competition in the global market for telecommunications services; (2) to prevent anti-competitive conduct in the provision of international services or facilities; and (3) to encourage foreign governments to open their communications markets.<sup>6</sup> To achieve these goals, the Commission instituted the ECO test as part of its Section 310(b)(4) public interest analysis for common carrier radio licensees or applicants with foreign ownership interests above the 25 percent benchmark level. Under the ECO test, the Commission

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<sup>5</sup> Notice at ¶ 34.

<sup>6</sup> *In the Matter of Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, IB Docket No. 95-22, RM-8355, RM-8392, FCC 95-475 (adopted November 28, 1995).

identifies the "home market" of the foreign investor and determines whether that home market presents "effective competitive opportunities" for U.S. carriers. As discussed below, the ECO test entails a four-part examination by the Commission to determine whether effective competitive opportunities exist for U.S. companies in the applicant's home country.<sup>7</sup> Those companies unable to satisfy the ECO analysis are denied the requested authorization or license because it is not deemed within the public interest to allow an exception to the 25% foreign ownership benchmark.

With the execution of the Basic Agreement, the Commission's goal of encouraging the development of an open global telecommunications marketplace is now embodied in a pro-competitive, multilateral trade agreement supported by 69 countries representing nearly 95 percent of the world's telecommunications market. Additionally, 65 of the 69 countries have adopted, in whole or in part, the Reference Paper on Pro-Competitive Regulatory Principles ("Reference Paper"), which contains a binding, enforceable set of competition rules.<sup>8</sup> Applying the ECO test to countries that have already committed to

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<sup>7</sup> While the Commission separated its discussion of facilities-based entry (ECO Test) and resale opportunities (Equivalency Test), it established virtually the same criteria for determining competitive opportunities in both areas. However, the Commission stated two practical distinctions: (1) the ECO test "applies only on routes where the foreign carrier applicant controls bottleneck facilities, whereas the equivalency test applies on all routes, (2) the ECO test "requires that the four principles be satisfied in the near future, while [the] equivalency standard requires that the principles be satisfied at the time [the Commission] makes an equivalency finding.

<sup>8</sup> Of these 65 countries, 55 guarantee pro-competitive regulatory principles, 4 commit to adopting pro-competitive regulatory principles in the future, and 6 adopt only some of the pro-competitive principles contained in the Reference Paper.

levels of market access equal to or greater than the U.S. would, at best, be redundant in light of the Basic Agreement, and at worst, the ECO test would serve as a hindrance to competition, rather than an instrument fostering the development of a worldwide, open telecommunications market.

**b. The Most Favored Nation and National Treatment Provisions Contained in the General Agreement on Trade in Services Provides Significant Assurances That Companies Will Have Access to Foreign Markets on a Non-Discriminatory Basis.**

The Basic Agreement was established under the framework of the General Agreement on Trade in Services ("GATS"). The GATS requires that all WTO Members accord to services and service suppliers of all other WTO members "Most Favored Nations" ("MFN") treatment. Under this provision, participating countries are precluded from treating companies from one WTO member country differently than companies from another WTO member country. Further, the GATS contains a provision for National Treatment, under which many Basic Agreement signatories have made a commitment to treat companies from other member countries as it treats its own domestic companies. Combined, the MFN and National Treatment provisions embodied in the Basic Agreement satisfy the Commission's goal of "creating effective competition [through] foreign market liberalization."<sup>9</sup>

The Commission should not apply the ECO analysis to applicants from countries that have made a commitment to provide MFN and National Treatment for all services.

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<sup>9</sup> Id. at Note 6.

Continued application of the ECO analysis to these applicants would send a negative message. It would appear that the Commission were undermining or ignoring the Nation's international obligations. Requiring a showing of effective competitive opportunities in these countries could seriously weaken the WTO Agreement because these countries may also choose to retain certain entry restrictions, thus making it difficult for U.S. companies to enter their markets.

**c. The Commission's Four-Part ECO Test is Satisfied by The WTO Agreement and the Reference Paper.**

In addition to MFN and National Treatment provisions, 65 parties to the Basic Agreement have also adopted, in whole or in part, the Reference Paper on Pro-Competitive Regulatory Principles. The Reference Paper contains principles upon which participating countries are to design their regulatory framework for basic telecommunications services. Among other things, the Reference Paper contains guidelines on implementing measures to prevent anti-competitive practices, provisions to ensure non-discriminatory interconnection arrangements, and a requirement that countries form independent regulatory bodies to regulate their telecommunications industries.

The Reference Paper addresses many of the questions the Commission seeks to determine through its ECO analysis. As developed, the ECO analysis is designed to ascertain whether (1) U.S. companies, as a matter of law, are able to provide the same services in the destination foreign country,<sup>10</sup> (2) there exists reasonable and

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<sup>10</sup> *Foreign Carrier Entry Order* at ¶ 47.

nondiscriminatory charges, terms and conditions for interconnection to a foreign carrier's domestic facilities for termination and origination of international services,<sup>11</sup> (3) competitive safeguards exist in the foreign country to protect against anti-competitive practices,<sup>12</sup> and (4) there is an effective regulatory framework in the destination country to develop, implement and enforce legal requirements, interconnection arrangements and other competitive safeguards.<sup>13</sup>

Together, the Basic Agreement and the Reference Paper satisfy the Commission's objectives under the ECO analysis. The first inquiry - whether U.S. companies as a matter of law are able to provide a particular service in the foreign applicant's home market - is fully answered by the schedules of commitment provided by each party to Basic Agreement. The Commission need only refer to each country's schedule of commitments to determine the level of market access in a particular service. The second inquiry - whether there exists reasonable and nondiscriminatory charges, terms and conditions for interconnection to a foreign carrier's domestic facilities - is addressed comprehensively in the interconnection provisions of the Reference Paper, and arguably by the MFN and National Treatment provisions embodied in the Basic Agreement. Thirdly, the ECO analysis is used to determine whether competitive safeguards exist in the foreign country to protect against anti-competitive practices. This concern is now addressed in Section 1 - "Competitive Safeguards" of the Reference Paper. Countries that have adopted the

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<sup>11</sup> Id. at ¶ 49.

<sup>12</sup> Id. at ¶ 51.

<sup>13</sup> Id. at ¶ 54.

Reference Paper agree to implement appropriate safeguards to prevent anti-competitive practices by major suppliers. Lastly, the Reference Paper satisfies the fourth objective of the ECO analysis in that the Reference Paper itself is meant to serve as a regulatory framework under which participating countries are to "develop, implement and enforce legal requirements, interconnection arrangements and other competitive safeguards." Whether a participating country has adopted the Reference Paper should weigh heavily in the Commission's decision whether or not to require a foreign applicant to make a showing under the ECO analysis.

**d. The WTO Agreement on Basic Telecommunications Services Is More Effective Than the ECO Test Because Foreign Countries, Rather than Foreign Companies are Responsible for Reducing Barriers to Trade.**

To the extent the ECO test remains a part of the Commission's Section 310(b)(4) public interest analysis, it can continue to be used as a means to open telecommunications markets currently closed to U.S. companies. As the Commission envisioned in its *Foreign Carrier Entry Order*, the ECO test creates an incentive for foreign companies to petition their governments to open their telecommunications markets. The Commission has in effect relied on the lobbying efforts of foreign applicants and licensees to open international markets for telecommunication services. With the establishment of the Basic



Agreement, the Commission now has two methods of ensuring that U.S. companies have access to foreign telecommunications markets, and that a foreign company's entry into the U.S. market is in the public interest.

Where countries have made adequate commitments to open their telecommunications markets to foreign competition, the Basic Agreement can serve as a surrogate for the ECO analysis. Using the Basic Agreement in this manner is good public and administrative policy. The Commission will save time and money by simply examining the commitments made by the applicant's country of origin.<sup>14</sup> If the level of access is equal to or greater than that guaranteed by the U.S., the Commission's inquiry needn't go further. If, however, the applicant's country of origin has not made sufficient commitments under the Basic Agreement, the Commission can still utilize the ECO analysis. An applicant from a non-WTO member country should be given the opportunity to demonstrate that the country has taken the steps to satisfy the ECO test. Continued use of the ECO analysis will provide an appropriate incentive for foreign applicants to encourage their governments to open their telecommunications markets to foreign competition.

**WHEREFORE, THE PREMISES CONSIDERED,** Shell Offshore Services Company respectfully urges the Federal Communications Commission to forego applying its effective competitive opportunities test as part of its Section 310(b)(4) public interest

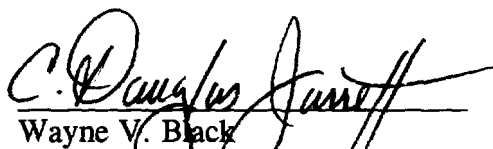
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<sup>14</sup> Through provisions contained in the GATS, each country party to the Basic Agreement may challenge another country's adherence to its Basic Agreement commitments through WTO dispute settlement provisions.

analysis to common carrier radio applicants from countries party to the World Trade Organization Agreement on Basic Telecommunications Services and have made market access commitments equal to or greater than that guaranteed by the United States.

Respectfully submitted,

**SHELL OFFSHORE SERVICES COMPANY**

A handwritten signature in dark ink, appearing to read "C. Douglas Jarrett", is written over a horizontal line.

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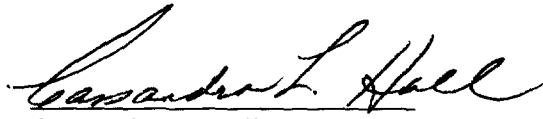
Dated: July 9, 1997

**CERTIFICATE OF SERVICE**

I, Cassandra L. Hall, a secretary in the law firm of Keller and Heckman LLP, hereby certify that on this 9<sup>th</sup> day of July, 1997, a copy of the foregoing Comments was served by first-class mail, postage prepaid, on the following:

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